FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. ~~621~~ 84

IN THE MATTER OF

ALBERT MARTIN COHEN, an attorney,

Petitioner,

v.

DENIS M. HURLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENIS M. HURLEY,
Respondent, Attorney Pro Se,
Room 301, Borough Hall Building,
Brooklyn 1, New York.

Telephone: MAin 4-7851

MICHAEL CAPUTO,
with him on the brief.

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CITATIONS

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BRIEF II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Albert Martin Cohen, seeks review of an order of the New York State Court of Appeals, dated April 1, 1960, which affirmed an order, dated December 31, 1959, disbarring petitioner from the practice of the law for professional misconduct. The order of disbarment was made by the Appellate Division of the Supreme Court, Second Judicial Department.

Petitioner's applications to stay the operation of the disbarment order were denied on April 27, 1960 by the Appellate Division and on May 4, 1960 by Mr. Justice Harlan.

Opinions Below

The opinion of the Appellate Division and the concurring and dissenting opinions are reported at 9 A. D. 2d 436. The opinion of the New York State Court of Appeals and the dissenting opinion are reported at 7 N. Y. 2d ——

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. § 1257 (3).

Question Presented

Does the disbarment of an attorney by a state court upon the ground that he breached his duty, as an attorney and officer of the court, by refusing to answer candidly questions directly relating to his professional conduct, during the court's general inquiry into unethical practices of attorneys, violate federal due process by reason of the fact that the attorney based his refusal to answer on the ground that his answers might tend to incriminate him?

Statement

Petitioner was disbarred from the practice of the law for refusing to answer questions relating to his professional conduct put to him during the course of the Appellate Division's Judicial Inquiry into unethical practices of attorneys. Concededly, the questions asked were within the scope of the Inquiry and pertinent to the investigation (R. 24; Petition, App. A, p. 22; 9 A. D. 2d at 438). His refusal to answer was on the stated ground that the answers might tend to incriminate him.* The disbarment

* For the same reason, petitioner refused to produce records demanded of him by a subpoena duces tecum (R. 10-11, 17, 52-53).

order of December 31, 1959, provided petitioner with 30 days leave within which to apply to vacate the order upon proof that he "has answered before the Justice presiding at the Judicial Inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum." (Petition, App. E, p. 67). Pursuant to an order of the Appellate Division, dated May 12, 1960, petitioner has the right to apply to the Appellate Division for an extension of this 30 day period.

Since petitioner seeks review upon the theory that the action of the New York courts raises a substantial question as to whether he was deprived of Fourteenth Amendment due process, we refer, at the outset, to the statutory authority for petitioner's disbarment together with a statement of the proceedings duly had in the courts below.

In New York State, plenary power to admit applicants to the Bar and to discipline attorneys is vested in the appellate division of the supreme court in each of the four Judicial Departments of the State.

Section 90 of the New York State Judiciary Law is entitled:

> § 90. Admission to and removal from practice by appellate division.

Subdivision 2 of Section 90 reads, as follows:

> 2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional

misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

The statutory procedure to be followed in disciplinary proceedings is prescribed in subdivision 6 of Section 90, as follows:

> Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense.

That these statutory procedures governing disciplinary proceedings were strictly complied with in the instant case becomes evident upon analysis of the facts and of the procedures followed by the Appellate Division.

On January 21, 1957 the Appellate Division, acting pursuant to Section 90, subdivision 6, second paragraph, Judiciary Law, in response to a petition of the Brooklyn Bar Association charging "ambulance chasing" and related unethical practices among attorneys in Kings County where petitioner had his office, ordered a preliminary investigation (Judicial Inquiry) into these alleged conditions by

an Additional Special Term of the Supreme Court presided over by a Supreme Court Justice.*

On two occasions (six months apart) petitioner appeared as a witness before the Supreme Court Justice presiding at the Inquiry. He was represented by his own counsel (R. 29; 37). The court and counsel for the Inquiry explained the nature of and the authority for the Inquiry (R. 30; 41-43). Petitioner and his attorney were informed by the Inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see *Anonymous* v. *Baker*, 360 U. S. 288, 291; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479), that there were no respondents or defendants (R. 30; 43); that petitioner was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry", which "bear on or relate to your professional conduct"; also, that counsel for the Inquiry had "information that indicates your participation in professional misconduct" (R. 43).

Counsel for the Inquiry then put into evidence 228 "Statements of Retainer" which during the years 1954 through 1958 petitioner had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more

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* The petition of the Bar Association alleged, among other things: "That such practices result in the following: unfair agreements of retainer; maintenance by lawyers of some system of obtaining prompt information of accidents; congestion of court calendars by unworthy causes which are never intended to be brought to trial; a false conception by lawyers engaged in this practice that the relationship between attorney and client is a commercial transaction in which the interest of the client plays an unimportant part; impairment of public confidence in the Courts; and delay in the administration of justice." (*Anonymous* v. *Baker*, 360 U. S. 288, 289, fn. 1.)

such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained (R. 44-46). (See: Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the Second Judicial Department—Clevenger's Annual Practice of New York, 1959.) Put into evidence, also, when petitioner appeared before the Judicial Inquiry were 76 other such Statements of Retainer filed during the same period by the law firm of Cohen & Rothenberg, with which petitioner had some association (R. 46-47). Counsel for the Inquiry informed petitioner and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow" (R. 44).

Petitioner answered a few preliminary questions as to how long and where he had practiced law (R. 29-30; 47-48). About sixty (60) other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 (R. 58); whether he was familiar with a rule requiring an attorney to maintain records of negligence cases for a stated period of time (R. 56); and whether he maintained a separate office bank account (R. 70)), on the ground that his answers might tend to incriminate or degrade him or expose him to a penalty or forfeiture (R. 31 *et seq;* 49 *et seq.*).

Those unanswered questions related to the identity of his law office partners, associates and employees (R. 32, 49, 50), to his possession of the records of the cases described in his Statements of Retainer (R. 53), to any destruction of such records (R. 54), to his bank accounts (R. 54), to his paying police officers (R. 59), court or prison employees (R. 60), or others for referring claimants to him (R. 60-61), to his paying insurance-company employees for referring cases to him (R. 61), and to his promising to pay to any "lay person" ten percent of recoveries or settlements (R. 61). He was asked—and refused

to answer—whether he had made or agreed to make such payments to any of several named persons (R. 61-64), whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies (R. 65) and whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the New York State Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors (R. 67).

At one stage of this questioning, counsel for the Inquiry pointedly called to petitioner's attention section 90 of the Judiciary Law which gives the appellate divisions power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice (R. 74). At that time the Inquiry's counsel cited Canon 22 of the Canons of Professional Ethics* requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers; also sections 270-a, 270-b, 270-c, 270-d and 276 of the New York State Penal Law, all relating to soliciting and fee-splitting (R. 74-76).

Counsel for the Inquiry warned petitioner and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division" (R. 73-74, 78).

Petitioner's counsel replied that he was relying on *Matter of Grae* (282 N. Y. 428) and *Matter of Ellis* (282 N. Y.

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* The Canons of Professional Ethics are contained in New York State Judiciary Law (McKinney's Book 29, 1948), Appendix, p. 764. In New York, attorneys have been disciplined for violation of these Canons. *Matter of Neuman*, 169 App. Div. 638. See also *Matter of Annunziato*, 201 Misc. 971.

435) as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do" (R. 78-79). Petitioner was given a further opportunity by the court to answer but persisted in his refusal (R. 81), all this being admitted in his pleading in this proceeding (R. 84-85).

The Justice presiding at the Judicial Inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against petitioner (R. 22).

The Appellate Division directed the respondent herein, counsel to the Inquiry, to commence disciplinary proceedings against petitioner (R. 22). In accordance with section 90, subd. 6, of the Judiciary Law, respondent instituted disciplinary proceedings against petitioner by service upon him of an order to show cause and a petition containing the charge against petitioner (R. 6-7). Petitioner's answer admitted all the factual allegations in the petition (R. 84). Accordingly, there remained for consideration by the Appellate Division a question of law only which was raised by petitioner in his affirmative defense that "he was within his legal and constitutional rights and moral prerogative in pleading the privilege against self-incrimination * * * under Article 1, Section 6 of the New York State Constitution", and that, under the circumstances "the imposition of any discipline upon * * * (petitioner) * * * would be a denial to him of due process in violation of his rights under the Constitution of the State of New York and under the Fourteenth Amendment of the Constitution of the United States" (R. 84-85).

After submission of briefs and oral argument, the proceeding before the Appellate Division culminated in its order of disbarment dated December 31, 1959 (R. 3). On appeal to the Court of Appeals, this order was affirmed (April 1, 1960).

ARGUMENT

POINT I

The non-federal grounds upon which the state courts relied are entirely adequate to support the final order of disbarment.

The decisions below are based primarily upon two substantial non-federal grounds: (1) an interpretation of the New York State Constitution, and (2) a construction of the relationship between a New York State court and a New York State lawyer. These non-federal grounds are adequate, in themselves, to support the decisions.

Petitioner in refusing to answer questions invoked the privilege against self-incrimination which was available to him by virtue of a provision of the New York State Constitution (Article 1, Section 6) which reads, in part, as follows:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

In a state proceeding, he could not properly plead the privilege as contained in the Fifth Amendment to the federal constitution. (*Lerner* v. *Casey*, 357 U. S. 468.) The courts below interpreted the New York constitution to mean that a lawyer may, without adverse consequences, plead the privilege as the basis for refusing to answer questions concerning his professional conduct put to him in the course of a New York State court's investigation into unethical practices of attorneys. They held that petitioner's invocation of his privilege must be sustained. Petitioner could not be compelled to incriminate himself out of his own mouth. What the New York State constitution guaranteed, petitioner was accorded in full measure.

The relationship of a New York State court and a New York State lawyer was construed below to involve a duty upon the lawyer to cooperate with the court in its investigation into unethical practices. Failing this cooperation, the relationship is dissolved by the removal of the attorney from the profession.

The complete adequacy of these non-federal grounds is shown by the following excerpts from the opinions of the courts below.

(Court of Appeals):

> Appellant's answer says that there is only an issue as to whether he was within his rights under article I, section 6, New York State Constitution, in pleading the privilege. The case, however, is not so simple. Of course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity (*Matter of Ellis*, 282 N. Y. 435, *supra*). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (see Judge Cardozo in *Matter of Rouss*, 222 N. Y. 81, 84). "Whenever the condition is broken the privilege is lost" (*Matter of Rouss, supra*). Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the Inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was "an officer of the court, and like the court itself, an instrument of justice" (Chief Judge Cardozo in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470, *supra*), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-

operate. Such "co-operation" is a "phrase without reality" as Chief Judge Cardozo wrote in *People ex rel. Karlin* v. *Culkin* (*supra*), if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court. (Petition, App. C, pp. 51-52.)

(Appellate Division):

We repeat: every attorney has an absolute right to assert his constitutional privilege against self-incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts his constitutional privilege he creates his own dilemma. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to co-operate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to co-operate with the court, then the court has no alternative but to revoke his privilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession. (Petition, App. A, p. 39, 9 A. D. 2d at 448).

Thus, the state courts disbarred petitioner upon wholly adequate state grounds.

POINT II

Petitioner's claim of deprivation of Fourteenth Amendment due process is insubstantial.

The federal constitutional question raised by petitioner may be restated thus: Is it constitutionally permissible for a supervisory body of a sovereign state to dismiss those whom it supervises on the sole ground that they refuse to answer questions put to them by the supervisory body in an effort to determine the fitness of those being interrogated to continue in their positions?

This question has been answered affirmatively by this court three times in less than two years, the third affirmation being made as recently as February 29, 1960 (*Lerner* v. *Casey*, 357 U. S. 461; *Beilan* v. *Board of Education*, 357 U. S. 399; *Nelson* v. *County of Los Angeles*, 362 U. S. 1).

We are here concerned with the precise problem of whether a state court in the exercise of its control over the conduct of attorneys within its jurisdiction may properly disbar one for refusing to cooperate with the court in its investigation into dishonorable practices. We are thus restricted to an issue, in the words of Mr. Justice Harlan, "intimately associated with the administration of justice in the local courts."* And, in this regard the instant proceeding is, in substance, indistinguishable from *Gair* v. *Peck*, 6 N. Y. 2d 97; *cert. den.*, 361 U. S. 374. There, as here, the question concerned the permissible limits of the New York State court's control over the conduct of lawyers.

In *Gair*, this Court refused to review a New York State judgment upholding an appellate division rule regulating the amount of fees which lawyers may properly receive in contingent-fee negligence cases.

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* Endorsement, dated May 4, 1960, of Mr. Justice Harlan on decision denying petitioner's application for a stay.

The non-federal question in *Gair* was the strictly local issue as to whether the rule adopted by a state court, limiting the fees of attorneys, could exist side-by-side with a state statute insuring attorneys freedom of contract with their clients (Judiciary Law, sec. 474). The federal claim of deprivation of liberty and property without Fourteenth Amendment due process was rejected as insubstantial.

In the instant case, the New York courts faced the local problem of whether, while upholding an attorney's invocation of his state constitutional privilege against self-incrimination (Art. 1, sec. 6) in refusing to answer proper questions in a judicial inquiry the attorney could be disbarred for breach of his inherent duty to the court (Judiciary Law, sec. 90). The New York courts determined that there was no conflict between the state constitution and the state statute; that there was a substantial difference between petitioner's right as a citizen and his obligation in his distinct capacity as an attorney.

In neither case did the Court of Appeals deem petitioner's asserted claims of denial of due process worthy of discussion.

Another similarity must be noted. The rule involved in *Gair* fixes the fees that lawyers may receive. But the rule also provides that upon proper proof by an attorney that his efforts are worth more than the fee fixed by the rule, the court will increase his fee. Flexibility is present here too. Petitioner was disbarred but with leave to apply to vacate the order of disbarment upon proof that he had performed his duty as a lawyer.

Petitioner relies heavily upon this court's grant of certiorari in *Konigsberg* v. *State Bar of California*, 344 P. 2d 777 (Sup. Ct. Calif.) on March 7, 1960. This court also granted certiorari in a similar case on May 2, 1960. *In Re Anastaplo*, 163 N. E. 2d 429 (Sup. Ct. Ill.). The indication that those cases may present substantial federal constitutional questions is unavailing in the instant proceeding.

For, in those cases, applicants for admission to the Bar of California and Illinois, respectively, refused to answer questions concerning their political philosophies on the ground that the questions were improper as violations of the First and Fourteenth Amendments of the United States Constitution. The questions were asked by the respective State Bar Committees charged with the responsibility of passing upon the qualifications of applicants for admission to the Bar. In both instances, the applicants were denied admission upon the sole ground that they refused to answer the questions.

In *Konigsberg*, the applicant refused to answer any questions put by committee members as to his membership in the Communist party, asserting that such inquiries infringed his rights guaranteed by the First and Fourteenth Amendments (344 P. 2d at 778).

In *Anastaplo*, the applicant refused to answer inquiries asked by the bar committee as to whether he was a member of the Communist party or any subversive organization (163 N. E. 2d at 430). He refused to answer on the ground that the First and Fourteenth Amendments barred such inquiries (163 N. E. 2d at 439).

In our case, petitioner refused to answer on the ground of possible self-incrimination. Consider too, the nature of the questions that petitioner-attorney refused to answer, *inter alia*: whether he paid police officers, court or prison employees for referring claimants to him; whether he paid lay persons ten percent of recoveries in negligence cases, and whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies.

Petitioner's right to invoke the privilege against self-incrimination as the ground for refusing to answer these questions was sustained by the courts of New York State.

Comparison between the privilege of freedom of political belief with the privilege against compulsory self-incrimina-

tion is here made only to show that a constitutional question involving the former may be substantial, while one involving the latter may be insubstantial, even though the constitutional questions are raised in cases wherein the facts are similar.

Certainly, this Court's attitude as to the relative importance in our way of life of these two privileges has been made plain. The maintenance of the freedom of political beliefs is a fundamental part of our constitutional system. (*Stromberg* v. *California*, 283 U. S. 359, 369). On the other hand, the privilege against compulsory self-incrimination "might be lost, and justice still be done." "Justice, however, would not perish if the accused were subject to respond to orderly inquiry." (*Palko* v. *Connecticut*, 302 U. S. 319, 325-326).

In our own case this distinction was stressed by the Appellate Division when it said:

> However, we are not dealing here with an attempt to force respondent to testify despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case. No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essentially with the procurement and the prosecution of negligence cases, and the questions put to respondent relate only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace. (Petition, App. A, pp. 26-27, 9 A. D. 2d at 440-441.)

We submit that the federal constitutional question raised by petitioner is insubstantial because (1) the question has been definitively decided adversely to petitioner in

three recent cases of this Court; (2) the question arises from a matter which is intimately associated with the administration of justice in the local courts and therefore those courts should make the final determination; (3) the question concerns a disbarment order which is flexible enough to allow petitioner, by his own act, to reenter the profession; and (4) the question involves an inquiry only into petitioner's professional conduct and is in no way concerned with his political beliefs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Brooklyn, N. Y., May 18, 1960.

Respectfully submitted,

DENIS M. HURLEY,
Respondent, Attorney Pro Se
Room 301, Borough Hall Building,
Brooklyn 1, New York.
Telephone: MAin 4-7851

MICHAEL CAPUTO, with him
on the brief.